

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. 05-CV-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO  
DEFENDANTS’ MOTION IN LIMINE TO PRECLUDE GENERALIZED  
REFERENCES TO DEFENDANTS ON ISSUES REQUIRING  
DEFENDANT-SPECIFIC PROOF (Dkt. #2399)**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“State”), and respectfully responds in opposition to Defendants’ Motion in Limine to Preclude Generalized References to Defendants on Issues Requiring Defendant-Specific Proof (Dkt. #2399) (“Motion in Limine” or “Motion”) as follows:

1. In their Motion in Limine, Defendants make the somewhat surreal argument that, at trial, the State should be barred from referring to Defendants as “Defendants.” Motion in Limine at 4. Defendants further argue that the State should not be permitted to refer to them as “Poultry Integrators” or “Poultry Companies.” *Id.* Defendants assert that the State should only be permitted to refer to them as “Defendants” “where evidence previously adduced already

establishes proof against each Defendant on a particular point.” *Id.* However, Defendants provide little guidance to the Court about which “particular point[s]” they have in mind.<sup>1</sup>

2. Overall, the relief requested by Defendants in their Motion is amorphous and untenable. It is simply not practical for the Court to “keep score” of each “particular point” at issue in the case where the State may properly refer to Defendants as “Defendants” versus each “particular point” where the State may not. The irony of the Motion in Limine is underscored by the fact that it is “Defendants’” Motion in Limine. That is, unsurprisingly, Defendants quite often refer to themselves as “Defendants” and have pursued a joint defense in this case.

3. In any event, to the extent Defendants are arguing that the State may not make reference to injuries caused by Defendants in the aggregate, that argument is without merit. Defendants’ aggregate pollution of the water bodies of the IRW is an entirely appropriate and relevant issue in this case. For instance, under Oklahoma law, when multiple tortfeasors’ acts concur, combine, or commingle to produce an indivisible injury, they may be held jointly and severally liable, even in the absence of concerted action. *See Boyles v. Okla. Natural Gas*, 619 P.2d 613, 617 (Okla. 1980). “With respect to environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury.” *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at \*41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004)<sup>2</sup> (citing *Union Tex. Petroleum Corp. v. Jackson*, 909

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<sup>1</sup> For instance, in the Motion in Limine, Defendants point to a history book which could indicate that there were other poultry integrators active in the IRW during the 1950s and 1960s. Motion at 3. However, it is unclear how Defendants believe this information should impact the State’s presentation. Defendants never “connect the dots” as to why this history book should preclude the State from referring to Defendants as “Defendants.”

<sup>2</sup> After a settlement was entered between the *Herd* plaintiffs and defendants Blue Tee Corp. and Gold Fields Mining Corp., the July 11, 2003 order was vacated as to *those two*

P.2d 131, 149-50 (Okla. Civ. App. 1995); *Harper-Turner Oil Co.*, 311 P.2d at 950-51; *U.S. v. Pess*, 120 F. Supp. 2d 503 (W.D. Pa. 2000)). Oklahoma’s “indivisible injury” doctrine applies in this case, just as Judge Eagan applied it in *City of Tulsa v. Tyson Foods*:

The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma and Arkansas law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple tortfeasors and the separate and independent acts of codefendants concurred, commingled and combined to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.

*City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement*. (citations and internal quotations omitted). In the *City of Tulsa* case, Judge Eagan further determined that: (1) “plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant”; and (2) “plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs.” *Id.* at 1300. Here, the State suffers a single, indivisible injury of contamination of the water bodies of the IRW caused by multiple tortfeasors whose separate and independent acts have combined to produce this foreseeable harm. For this reason alone, it is proper for the State to refer to Defendants as “Defendants,” “Poultry Integrators” or “Poultry Companies.”

4. Furthermore, to the extent Defendants are arguing that the State lacks adequate proof of Defendant-specific causation, that argument is also without merit. Indeed, during the continued dispositive motion hearing on August 17, 2009, the Court denied Defendants’ “Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of

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*defendants only*. See *Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D.Okla. Jan. 13, 2004); and 01-CV-891-H(C), Dkt. #737. The vacation order was entered pursuant to an unopposed motion. See *Herd*, 01-CV-891-H(C), Dkt. #747. The portion of the July 11, 2003 order regarding causation was not withdrawn nor its legal reasoning altered in any way.

Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6 and 10” (Dkt. #2069) and the Cargill Defendants’ Motion for Summary Judgment (Dkt. #2079). At trial, the State will make its case against each Defendant, and will thusly refer to individual Defendants when presenting its Defendant-specific evidence. As an illustration and without limitation, at trial, the State will present: (1) evidence of the massive volumes of waste generated annually by *each* Defendant; (2) evidence as to the number and location of active poultry houses for *each* Defendant; (3) evidence that the vast majority of poultry waste from Defendants’ birds is land applied in close proximity to the houses where it is generated; and (4) available soil test data for *each* Defendant showing widespread disposal of poultry waste within the watershed.

5. While the State will clearly be presenting aggregate and Defendant-specific proof at trial, it is impracticable for the Court to set pre-determined ground rules at this point as to when the State may -- and may not -- properly refer to Defendants in the aggregate.

6. The Motion in Limine should be denied.

Respectfully submitted,

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I certify that on the 20<sup>th</sup> day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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